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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CENTURY CITY MEDICAL PLAZA,

Plaintiff and Appellant,

v.

BAHRAM KASHFIAN,

Defendant and Respondent.

B262183

(Los Angeles County
Super. Ct. No. SC121492)

APPEAL from an order of the Superior Court of Los Angeles County,

Lisa Hart Cole, Judge. Affirmed.

Raiskin & Revitz and Steven J. Revitz for Plaintiff and Appellant.

Law Office of Kenneth Gaugh and Kenneth Gaugh for Defendant and
Respondent.

INTRODUCTION

Plaintiff Century City Medical Plaza, a limited partnership, (plaintiff) appeals from an order vacating the default and default judgment entered against defendant Bahram Kashfian, D.M.D., aka Barry Kashfian (defendant). Plaintiff contends the trial court erred in granting defendant's motion to vacate because the evidence did not establish that the default and default judgment were entered as a result of extrinsic mistake. Plaintiff also contends defendant does not have a meritorious defense to the action and that he failed to act diligently in seeking relief from the court. Finding no abuse of discretion, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

1. The Operative Pleading

On October 10, 2013, plaintiff sued defendant for breach of contract and common count on an open book account. The first cause of action sought damages of at least \$41,857 for defendant's breach of a commercial lease. Plaintiff alleged defendant abandoned the leased premises, leaving behind furniture, dental equipment, and trade fixtures. In addition, plaintiff alleged that beginning in August 2013, defendant failed to pay rent and other charges. The second cause of action alleged defendant owed at least \$16,153 on an open book account for office services.

2. Settlement Discussions and \$30,000 Payment

After the lawsuit was filed, the parties engaged in settlement negotiations. For example, between October 2013 and November 2013, defendant sent plaintiff three settlement checks, each of which contained a restrictive endorsement. Specifically, in October 2013, defendant mailed the first check, for \$20,000. Defendant wrote "full settlement" on the check. On October 25, 2013, plaintiff returned the check without cashing it.

On November 18, 2013, defendant mailed the second check, for \$25,000. On the front of the check, defendant wrote: "Settlement, Suite 1406, 90067." On the back of the check, defendant wrote: "Settlement of case #SC121492[.] To Steven J Revitz and Century City Medical Plaza LL[P:] Dear Management. By virtue of accepting and

cashing or deposit of this check You are agreeing to drop all charges, law suits, lease Billing, invoice of Barry Bahram Kashfian And keeping him and his agents harmless of any liability, Claims and lawsuits[.] Thank you[,] Barry Barham Kashfian[.]” On November 25, 2013, plaintiff returned the check without cashing it.

On December 2, 2013, defendant mailed the third and final check, for \$30,000. On the front of the check, defendant wrote: “Suite 1406—Final Settlement” and “LASC. Case #SC121492.” On the back of the check, defendant wrote: “To Century City Medical Plaza LLC[:] By Virtue of accepting and cashing this check you will drop all charges & keep Barry Barham Kashfian or his agents harmless of any lease, law suit, statement & any bills or invoices[.] [F]urther it is understood the proceeding of any sale of dental equipment will be forwarded to me[.] Thanks, Barry Kashfian[.]” On December 5, 2013, plaintiff endorsed and deposited the \$30,000 check.

After cashing the \$30,000 check, plaintiff sent defendant a series of letters in which it proposed settling the case for \$30,000, provided defendant transfer title to the furniture and dental equipment remaining on the property. Defendant did not transfer title to the equipment, and plaintiff did not return the \$30,000.

3. *Entry of Default and Default Judgment*

On November 21, 2013, default was entered against defendant. On February 10, 2014, plaintiff filed a request for entry of default judgment. In the request, plaintiff claimed total damages of \$22,039.60, with \$0.00 acknowledged credits. The two-page request for entry of default judgment was served on defendant by regular mail on February 4, 2014. Plaintiff also filed with the court two prove-up declarations with supporting exhibits. According to the declarations, plaintiff’s total damages of \$22,039.60 consisted of \$13,369 in general damages, \$850.15 in interest, \$512.95 in costs, and \$7,307.50 in attorney fees. The \$13,369 in general damages was for net delinquent rent and fees; it appears to have been calculated by taking the \$43,369 total

rent and fees owed from August 2013 through March 2014—\$40,320 for rent,¹ \$3,024 in late fees,² and a \$25 returned check fee—and subtracting the \$30,000 settlement check. Although filed with the court, there is no evidence in the record that defendant was served with the prove-up default judgment documents, including the two declarations.

On February 10, 2014, the court entered default judgment against defendant for \$22,039.60, the full requested amount. On February 18, 2014, plaintiff served defendant with notice of entry of judgment. On February 20, 2014, plaintiff filed a notice of judgment lien with the California Secretary of State. On August 25, 2014, plaintiff recorded the abstract of judgment with the Los Angeles County Recorder's Office.

4. *Defendant's Motion to Vacate and the Court's Ruling*

On September 8, 2014, defendant received a notice of involuntary lien from the Recorder's Office. Defendant retained counsel days later, on September 11, 2014.

On November 18, 2014, after plaintiff refused to release the judgment lien, defendant moved to vacate the default and default judgment. In his moving papers, defendant contended he believed the case had settled for \$30,000, and did not learn otherwise until he received the notice of involuntary lien from the Recorder's Office. In its opposition papers, plaintiff argued its position had been clear that there would be no settlement unless defendant removed the abandoned property or transferred it to plaintiff, and that defendant was never deceived into not participating in the proceedings. Plaintiff also argued defendant had no meritorious defense to the action

¹ Plaintiff claimed that as of October 10, 2013, defendant owed \$16,795 in unpaid rent and fees. However, according to plaintiff's ledger, the total claimed unpaid rent and fees for August, September, and October 2013 is \$16,657.

² This total includes a \$504 late fee imposed in January 2014. That month, the settlement check covered the first \$2,759 of the \$5,040 rent, leaving an unpaid balance of \$2,281. Because, under section 3(h) of the lease agreement, the late fee is 10% *of the overdue amount*, this fee should have been \$228.10.

because he acknowledged breaking the lease, and that in any event, defendant's motion was untimely.

On January 23, 2015, the court issued a tentative ruling finding sufficient facts to establish extrinsic mistake. The court emphasized defendant's potentially meritorious defense—whether plaintiff's deposit of the \$30,000 and failure to return the funds constituted a settlement and satisfaction—and the lack of prejudice to plaintiff. Thereafter, the court adopted its tentative ruling and granted the motion. The record does not include a reporter's transcript of the hearing on the motion, a settled statement of what occurred, or other record of the oral proceedings. On February 4, 2015, the court entered an order vacating the default and default judgment. Plaintiff timely appealed.

CONTENTIONS

Plaintiff contends the court abused its discretion in vacating the default and default judgment because the evidence was insufficient to prove they were entered as a result of extrinsic mistake, defendant does not have a meritorious defense to the complaint, and defendant did not act promptly upon discovery of any mistake.

DISCUSSION

When, as here, a motion to vacate a default judgment is made more than six months after the entry of default, the motion is governed not by the court's statutory authority to grant relief under Code of Civil Procedure section 473, but by the court's inherent equity power. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) "One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." (*Ibid.*) Extrinsic mistake involves "the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present." (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.)

To qualify for equitable relief from default and judgment based on extrinsic mistake, the moving party must satisfy three elements. First, he must provide a satisfactory excuse for not defending the original action; second, he must prove he has a meritorious defense; and third, he must establish that upon discovering the default judgment, he diligently attempted to set it aside. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147–1148.)

We review the court’s ruling “for an abuse of discretion, determining whether [its] decision exceeded the bounds of reason in light of the circumstances before the court. [Citation.] In doing so, we determine whether the trial court’s factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions [citations].” (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.) A court acts within its discretion unless its ruling “is ‘so irrational or arbitrary that no reasonable person could agree with it.’” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) Therefore, we may disturb discretionary rulings only where appellant establishes “ ‘a clear case of abuse’ ” and “ ‘a miscarriage of justice.’ ” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

1. *Substantial Evidence Supports the Court’s Finding of Satisfactory Excuse*

We first examine whether defendant had a satisfactory excuse for failing to file a timely answer to the complaint. (*Rappleyea, supra*, 8 Cal.4th at p. 982.) Here, the parties agree that after plaintiff filed the complaint on October 10, 2013, they engaged in settlement negotiations. Although default was entered against defendant on November 21, 2013, on December 2, 2013, defendant sent plaintiff a check for \$30,000 as final settlement of all claims against him. Notably, this check contained several restrictive endorsements. On the front of the check, defendant wrote: “Suite 1406—Final Settlement” and “LASC. Case #SC121492.” On the back of the check, defendant wrote: “To Century City Medical Plaza LLC[:] By Virtue of accepting and cashing this check you will drop all charges & keep Barry Barham Kashfian or his agents harmless of any lease, law suit, statement & any bills or invoices[.] [F]urther it is understood the

proceeding of any sale of dental equipment will be forwarded to me[.] Thanks, Barry Kashfian[.]” It is undisputed that plaintiff endorsed the check and deposited it on December 5, 2013.

After plaintiff deposited the \$30,000 check, the parties exchanged several letters in which plaintiff’s counsel attempted to negotiate *additional* settlement terms. Ultimately, defendant did not agree to the additional terms; plaintiff did not return the \$30,000 at any point. (See Com. Code, § 3311, subd. (c)(2) [claim not discharged if claimant repays full amount within 90 days].) On these facts, it was more than reasonable for defendant to conclude the case had settled and he did not need to take further action. At a minimum, the court did not err in concluding “the Default and the Judgment were entered as a result of extrinsic mistake by Kashfian, that mistake being Kashfian’s belief that he had no further obligation to CCMP when it negotiated a settlement check Kashfian tendered to CCMP on December 6, 2013.” Certainly, it was for the trial court to “consider the declarations and counterdeclarations, assess credibility, and determine the facts.” (*Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647.) We have no power on appeal to reweigh the evidence or to judge the credibility of witnesses. (*Kimble v. Board of Education* (1987) 192 Cal.App.3d 1423, 1427.)

2. *The Mistake Was Extrinsic*

Next, plaintiff contends defendant’s mistake, “even if factually justified, . . . does not constitute extrinsic mistake as a matter of law.” Rather, plaintiff argues, the mistake was intrinsic to the action because defendant was given notice and an opportunity to participate.

The term “extrinsic mistake” is “given a broad meaning by the courts, and tend[s] to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. [Citation.] The term ‘extrinsic’ refers to matters outside of the issues framed by the pleadings, or the issues adjudicated. [Citation.]” (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 738 (*Aldrich*).) “Mistake has been defined as ‘. . . the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done.’ ” [Citation.] The same reasoning

logically applies to a failure to act—an omission.” (*Ibid.*) Most often, an extrinsic mistake involves a party’s excusable neglect. (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471.) “ ‘Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances.’ ” (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419.) “When this neglect results in an unjust judgment, without a fair adversary hearing, and the basis for equitable relief is present, this is extrinsic mistake.” (*In re Marriage of Melton* (1994) 28 Cal.App.4th 931, 937.)

In this case, default was entered against defendant on November 21, 2013. A mere two weeks later, on December 5, 2013, plaintiff deposited the \$30,000 settlement check. Those funds carried clear conditions—namely, that plaintiff would “drop all charges” and hold defendant “harmless of any lease, law suit, statement & any bills or invoices.” Because defendant believed the case had been resolved, he did not move to vacate the default. Certainly, we acknowledge that defendant should have realized that plaintiff had a different view. We also acknowledge that the court was not persuaded that defendant did not receive the notice of entry of default judgment served on February 18, 2014, or the notice of judgment lien filed with the California Secretary of State on February 20, 2014. However, even if defendant received those documents in February 2014, the record supports the court’s finding of extrinsic mistake. In the request for entry of default judgment, plaintiff asked the court for a total award of \$22,039.60, with acknowledged credits of \$0.00. The subsequent judgment ordered defendant to pay \$22,039.60, the full amount requested. Notably, neither of these documents accounted for the \$30,000 defendant had already paid. And, while the prove-up default judgment documents—e.g., the declarations—accounted for the funds, there is no evidence in the record that defendant was served with the prove-up documents. Put another way, under plaintiff’s version of events, defendant received notice that judgment was entered against him for \$22,039.60—with no offsetting credits—in a case in which he had already paid plaintiff \$30,000. Viewed in the light most favorable to the ruling below, these facts established excusable neglect and extrinsic mistake.

3. *Substantial Evidence Supports the Court's Finding that Defendant Has a Meritorious Defense*

We next examine whether defendant had a meritorious defense. In his declaration in support of the motion to vacate, defendant stated: “I have a meritorious defense to Plaintiff’s lawsuit against me as stated in my attached Proposed Verified Answer in that Plaintiff accepted my \$30,000 offer as full and final settlement of all claims they allegedly had against me.” The trial court agreed, concluding, “[w]hether the cashing of the \$30,000 check with the restrictive endorsement constitutes a settlement and satisfaction is a triable issue. Based on the facts presented by both sides, it appears that Defendant has a meritorious defense to the action.” The trial court was correct. In light of plaintiff’s endorsement of the \$30,000 check for “Final Settlement,” defendant could establish a valid accord and satisfaction or a meritorious defense to the lawsuit based on an apparent settlement resolving a disputed claim. (See Civ. Code, § 1526, subd. (a) [check may be construed as accord and satisfaction if creditor does not strike payment in full language from check].)

4. *The Record Supports the Court's Finding that Defendant Exercised Sufficient Diligence*

Finally, we address whether the court erred in setting aside the default and default judgment even though defendant waited eight months after entry of default judgment before filing the motion to vacate. “One moving in equity to set aside a default judgment must act diligently in making his motion after he learns of the default judgment.” (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 856-857.)

As already discussed, defendant contends he did not take action after entry of the default because he believed he settled the claims against him when plaintiff cashed his \$30,000 settlement check on December 5, 2013. And although the court was not persuaded by defendant’s claim that he did not receive the February 2014 notice of entry of default judgment, it noted that once defendant learned “of the recording of the enforcement of judgment” on September 8, 2014, he “moved expeditiously” to set aside the default and the default judgment. The court’s conclusion was not an abuse of

discretion. (See *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 355 [six month delay between discovery of judgment and filing of motion to vacate was not unreasonable].)

In any event, the court properly balanced defendant's unlikely story against the prejudice he would suffer if his motion were denied. Of the three elements a defendant must satisfy to win equitable relief, "diligence is the most inextricably intertwined with prejudice." (*Rappleyea, supra*, 8 Cal.4th at pp. 983–984.) " 'The greater the prejudice to the responding party, the more likely it is that the court will determine that equitable defenses . . . apply to the request to vacate a valid judgment.' " (*Id.* at p. 983.) "If heightened prejudice strengthens the burden of proving diligence, so must reduced prejudice weaken it." (*Id.* at p. 984.) Therefore, plaintiff's "[l]ack of prejudice is *one* of the factors the trial court may properly consider in determining whether defendant acted diligently." (*Weitz v. Yankosky, supra*, 63 Cal.2d at p. 857.) In this case, plaintiff did not claim below that it would suffer prejudice if the default and default judgment were vacated, and has not done so on appeal. In light of the absence of prejudice to plaintiff and the "correspondingly lower" burden on defendant to show diligence, the court did not abuse its discretion in awarding equitable relief. (*Rappleyea, supra*, 8 Cal.4th at p. 984.)

DISPOSITION

The order vacating the default and default judgment is affirmed. Respondent shall recover his costs on appeal.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

JONES, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.